Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SEAN STEPHEN AND DARYL STEPHEN,
Petitioners,

v.

POLICE OFFICER JOHN HANLEY,
SHIELD NO. 13199, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The plaintiffs filed a complaint seeking damages under 42 U.S.C. § 1983 for excessive force. It was alleged in the complaint and undisputed that all defendant police officers were in the plaintiffs' two-bedroom apartment at the time of the alleged assault. The question presented is:

Whether the complaint put defendants on notice that plaintiffs could argue at trial that defendants were liable for their failure-to-intervene to prevent the use of excessive force.

RULE 14.1(b) STATEMENT

The full caption is:

1. Sean Stephen
2. Daryl Stephen,

Plaintiffs-Petitioners

v.

1. Police Officer John Hanley, Shield No. 13199
2. Police Officer Edgar Bourdon, Shield No. 30988
3. Sergeant Juan White
4. Police Officer Michael Iliadis
5. Police Officer Terrence Brill
6. Police Officer Patrick Coleman
7. Police Officer Derek Dunston
8. Police Officer Richard Miller
9. Police Officer Jose Hernandez

Defendants-Respondents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Sean and Daryl Stephen, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit (App., *infra*, 1a–6a) is unreported. The rulings of the District Court (App., *infra*, 7a–30a) also are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 2010. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This case arises from the use of excessive force against a 14-year-old boy, Petitioner Daryl Stephen, and his father, Petitioner Sean Stephen, by members of a New York City Police Department ("NYPD") Emergency Services Unit ("ESU team") and members of the NYPD Anti-Crime Unit (collectively, "the defendants"), during the execution of a search warrant and subsequent arrest of Sean Stephen.

A. The Facts Giving Rise to the Stephens' Lawsuit

In the pre-dawn hours of July 10, 2002, the defendants, acting pursuant to a search warrant, forcibly raided the home of 73-year-old Emelda Stephen, grandmother of Petitioner Daryl Stephen. A. 701, 758–59.[1] At the time of the raid, Sean and Daryl Stephen were visiting. A. 750–51.

According to Sean and Daryl Stephen ("the Stephens"),[2] the incident occurred in two stages. During the first stage, the ESU team, which consisted of seven officers wearing helmets and body armor and

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[1] "A. __" citations refer to the Joint Appendix filed in the Second Circuit.

[2] Petitioners recognize that the unfavorable jury verdict may indicate that the jury did not credit their version of events. But, as explained below, given that the jury found that excessive force was used by the only defendant that plaintiffs were able to identify conclusively during the initial stage of the raid, the unfavorable verdict could have resulted from the District Court's failure to instruct the jury on the failure-to-intervene theory. When the District Court denied the request for an instruction on that theory, the governing standard was whether the theory "[wa]s supported by evidence of probative value." *Anderson* v. *Branen*, 17 F.3d 552, 557 (2d Cir. 1994).

carrying machine guns, bunker shields, and a battering ram, among other weapons (A. 1249, 1282–83), initiated the raid. Upon entering the apartment, the ESU team immediately encountered the Stephens, who had been asleep in a small bed that they were sharing, less than 10 feet from where the ESU team entered the apartment. A. 758. Although the Stephens were unarmed, were dressed in nothing but their underwear, and posed no threat to the heavily-armed ESU team (*ibid.*), at least one ESU team member (according to the jury) assaulted the Stephens. None of the other members of the team asserted that they did anything to stop the use of excessive force.

According to the plaintiffs' testimony, Sean Stephen was struck repeatedly while still in bed. A. 759. Although he attempted to cover up in the fetal position and shield his son from defendants' blows (A. 760–61), he never resisted arrest, struck, attempted to strike, or initiated any physical contact with the defendants (A. 1003, 1333–34, 1571). Daryl Stephens was pushed by his father out of the bed, and he ran for a hallway leading to his grandmother's bedroom. A. 987. While in the hallway, Daryl was kicked to the ground and stepped on until he lost consciousness. A. 989–97. According to hospital records, Daryl suffered a left ear laceration, a cerebral concussion, a facial contusion, and multiple traumas to his body. A. 57, 66. Daryl also was diagnosed with a debilitating case of chronic post-traumatic stress disorder. A. 1367.

Throughout this initial stage of the incident, the lights remained off, and due to the pre-dawn hour, the apartment was dark. A. 759. As a result, the Stephens were unable to identify which specific offic-

ers initially attacked them, though each of the defendants stipulated to having been present at the scene. A. 760, 262–63. Notwithstanding the officers' acknowledgment that they were present during the incident, the entire ESU team claimed a total lack of recollection of the incident. A. 1225, 1268, 1270, 1485, 1504, 1527, 1529–30.

After Daryl Stephen regained consciousness, he was brought back into the bedroom by Officer Brill in handcuffs and positioned next to his father on the bed that they had shared. A. 995–97. By this time, the lights had been turned on, allowing the Stephens to identify Brill as the individual who brought Daryl back from the hallway, as well as the other officers who used excessive force against them during the remainder of the incident. A. 762–63, 777, 996–97.

B. The Proceedings Below

The Stephens, acting *pro se*, filed a lawsuit in the Eastern District of New York on December 2, 2003, for violations of their Fourth Amendment rights by virtue of defendants' use of excessive force. A. 42–53. The plaintiffs invoked the court's jurisdiction under 28 U.S.C. § 1331. The Stephens later filed three amended complaints. A. 82–96. After the Stephens retained counsel, they filed a fourth amended complaint, the operative complaint in this case, on February 4, 2006. A. 104–11. Approximately one year later, on February 15, 2007, current counsel entered a notice of appearance as *pro bono* counsel for the Stephens. A jury trial was held between June 1, 2009 and June 5, 2009.

Prior to and throughout the trial, the Stephens proposed a jury instruction on the defendant officers' liability for failing to intervene to prevent the use of

excessive force by others. The Stephens first submitted a proposed jury instruction on this topic on April 7, 2009, approximately two months before trial. App., *infra*, at 33a–35a. During a pre-trial conference on May 27, 2009, the District Court requested that the parties submit letter briefs supporting or opposing the proposed instruction. A. 281. Defendants argued that any claims for a duty to intervene were required to have been plead as a separate cause of action from the claim for excessive force. The Stephens maintained that the duty to intervene is inherent in any excessive-force claim under the Fourth Amendment, and, regardless, that defendants had substantial actual notice of the theory. A. 281–84.

On the morning of June 1, 2009, the first day of trial, the District Court rejected the proposed jury instruction. App., *infra*, 7a-17a. Nonetheless, the court informed the Stephens' counsel that they could raise the issue again at the charging conference and argue that evidence presented over the course of the trial supported the proposed instruction. *Id.* at 17a. Despite an extensive trial record showing a duty and opportunity to intervene, the District Court again rejected the proposed instruction on June 5, 2009. *Id.* at 21a–28a. Compounding the prejudice from the lack of an instruction on the duty to intervene, the District Court instructed the jury that, in order to find any particular defendant liable, it had to conclude that that defendant caused injury to the Stephens through the use of excessive force. *Id.* at 29a–30a.

After two days of deliberations, the jury found defendant Brill liable to Daryl Stephen and awarded nominal damages. App., *infra*, at 2a-3a. The jury

found in favor of all remaining officers. The District Court entered judgment on June 15, 2009. A. 1953.

The Stephens timely filed a notice of appeal on July 8, 2009. A. 1954–57. On appeal, the Stephens argued, among other things, that the District Court had erred by refusing an instruction on their duty-to-intervene theory of excessive force. In a summary order entered on May 12, 2010, the Second Circuit affirmed. App., *infra*, 1a–6a. The court found that "plaintiffs' fourth amended complaint . . . did not proceed on this theory," instead alleging that each officer-defendant affirmatively used force against the plaintiffs. *Id.* at 4a. The court also stated that "[p]laintiffs alleged no facts in the pleading to suggest that it was difficult to ascertain each defendant's role in the assaults or that they intended to proceed on a 'duty to intervene' theory of liability." *Ibid.* The Second Circuit characterized the theory as "a new theory of liability" and held that the District Court did not abuse its discretion by declining to give the instruction. *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

Courts across the country are split on the question of whether claims against law enforcement officers pursuant to 42 U.S.C. § 1983 for the failure to prevent the use of excessive force must be pleaded separately from excessive force claims arising under the same statute. In this case, the Court of Appeals for the Second Circuit affirmed the District Court's holding that claims for the failure to prevent excessive force must be pleaded separately from claims for excessive force. In so ruling, the Second Circuit joined the First and Sixth Circuits in requiring plaintiffs claiming excessive force, many of whom are indigent and proceeding *pro se*, to separately and

specifically allege that law enforcement officers should be held liable for the failure to prevent excessive force, even where multiple officers are alleged to have used excessive force in a group setting.

The pleading requirement imposed by the First, Sixth, and now Second Circuits is in tension with decisions by other circuit courts, including the Seventh and Eleventh Circuits. This Court's review is warranted to correct the error below and resolve this important question.

I. The Second Circuit's Pleading Standard Is Unduly Strict and Inconsistent With This Court's Precedents.

Several decisions by this Court over the last three years have stressed the importance of facts in pleading. In *Bell Atlantic Corp.* v. *Twombly*, this Court emphasized that facts, not "labels and conclusions," are the key to evaluating the sufficiency of a pleading. 550 U.S. 544, 555 (2007). One year later, in *Ashcroft* v. *Iqbal*, this Court further emphasized the necessity for specific facts in pleadings and rejected a complaint that relied solely on a "formulaic recitation of the elements" of the claim. 556 U.S. —, 129 S. Ct. 1937, 1951 (2008). Those cases follow a long line of precedent in which this Court has declared that the purpose of notice pleading is "to focus litigation on the merits of a claim" (*Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 514 (2002)) and that pleading should not be "a game of skill" in which counsel's failure to use buzz words is decisive (*Conley* v. *Gibson*, 355 U.S. 41, 48 (1957)). See also *ibid.* ("all pleadings should be construed to do substantial justice").

The ruling here is inconsistent with the repeated holdings of lower courts that failure to intervene is not a distinct cause of action but rather is a form of excessive force. See *Hale* v. *Townley,* 45 F.3d 914, 919 (5th Cir. 1995) (addressing "Bystander Liability" as a subcategory of "Excessive Force"); *Cusamano* v. *Sobek*, 604 F. Supp. 2d 416, 429 n.9 (N.D.N.Y. 2009) ("an officer's failure to intervene during another officer's use of excessive force can itself ***constitute*** excessive force") (quoting *Lorenzo* v. *Moore*, No. 06-2717, 2008 WL 314570, at *4 (D.N.J. Jan. 30, 2008)) (emphasis added); *Oliver* v. *City of Orlando*, 574 F. Supp. 2d 1279, 1284 & n.8 (M.D. Fla. 2008) (finding that an officer whose conduct was "purely passive" can be liable for "using excessive force" under failure-to-intervene theory). As the Seventh Circuit has explained, failure to intervene is one of the "four possibilities [for liability] in a tort case with multiple defendants." *Richman* v. *Sheahan*, 512 F.3d 876, 884–85 (7th Cir. 2008).

Here, even the Third Amended Complaint, filed *pro se*, alleged facts that should have put the defendants on notice that they could be liable for excessive force under a failure-to-intervene theory. As the District Court acknowledged, the Stephens' earlier complaints contained specific allegations that "particular officers were present while another officer allegedly engaged in excessive force against one of the plaintiffs." App., *infra*, at 22a. Moreover, the Fourth (and final) Amended Complaint alleged that Sergeant White supervised the other defendants during the incident. *Id.* at 32a. The Second Circuit further noted that the defendants were on notice of the theory no later than "some eight weeks before trial," when they received the plaintiffs' proposed jury instructions. *Id.* at 4a.

Any claim of prejudice from lack of notice is further belied by the District Court's observation that both sides "explored" the duty to intervene during discovery. App., *infra*, at 23a. Deposition testimony adduced many months before trial brought this theory into focus as well. When asked why he was suing Sergeant White, Petitioner Sean Stephen responded that "Sergeant White was in the household. White was there while they was beating me and he didn't do anything to stop them from doing anything." A. 326. And each of the defendants was asked whether he saw any other officers use excessive force. *Ibid.*

This case thus presents an ideal vehicle to clarify the pleadings required to sustain failure-to-intervene liability under 42 U.S.C. § 1983 and provide the lower courts with guidance in dealing with such claims. In this case, there is no question that the plaintiff pleaded all the ***facts*** that were necessary to support the theory and provided adequate notice to the defendants. First, the complaint specifically identified each defendant officer as being present at the time the alleged use of force occurred (and that fact was undisputed at trial). Second, the complaint was specific as to the type of force used against the plaintiffs, its time, and its location. Third, the complaint specifically explained that the alleged assault occurred at 4:30 A.M., when it was still dark. App., *infra*, 31a.

Despite the pleadings and the actual notice both during discovery and eight weeks before trial, the District Court and Second Circuit held that the plaintiffs had lost the opportunity to argue failure to intervene solely because they did not specifically plead that the defendants failed to intervene to prevent the excessive force used by other officers.

The loss of that theory easily could have altered the outcome of the case. The jury found that Officer Brill used excessive force. As to each of the other defendants in relation to the initial encounter with the Stephens, the jury could consistently have found (1) that there was insufficient evidence that that particular officer ***used*** force, but (2) that there was sufficient evidence that that officer had an opportunity to stop the use of force by Brill or another officer whom plaintiffs were unable to identify. It is worth emphasizing that all of the officers stipulated to having been present in the tiny apartment during the incident and that none asserted that he intervened to stop the use of force. In the absence of an instruction on the duty to intervene, the proximate cause instruction left the jury with little choice but to find in favor of the defendant officers whom plaintiffs could not conclusively identify.

Accordingly, this case squarely presents the question of whether a duty to intervene must be asserted as a distinct claim, or whether defendants are adequately put on notice by a complaint that asserts excessive force by a group of law enforcement officers and alleges facts that support liability on the basis of a failure-to-intervene.

II. Lower Courts Have Come to Divergent Conclusions in Cases Involving Similar Facts.

This Court's review is necessary to provide clarity to the lower courts, which have treated similar cases inconsistently. The First and Sixth Circuits expressly hold as a matter of law that a failure-to-intervene theory of liability must be pled separately. In this case, the Second Circuit likewise rejected Petitioners' argument that failure to intervene was en-

compassed by a claim of excessive force, which was supported by factual allegations that all defendants were present during the assault and that none intervened. By contrast, the Seventh and Eleventh Circuits have allowed failure-to-intervene claims even when they were not explicitly and separately pled in the Complaint.

The First and Sixth Circuits each have addressed this issue squarely. In *Calvi* v. *Knox County*, the First Circuit recognized that the plaintiff's "argument rests . . . on the proposition that a failure to intervene claim is implicit in an excessive force claim directed at multiple defendants." 470 F.3d 422, 431 (1st Cir. 2006). It held that "[w]e reject that proposition." *Ibid.*

Similarly, the Sixth Circuit, in *Thornton* v. *Spooner*, addressed claims of excessive force against a group of police officers. On summary judgment, the plaintiff argued that one officer failed to intervene when another twisted his head and neck. See 872 F.2d 1029 (tbl.), 1989 WL 34026, *3 (6th Cir. 1989) (unpub.). Even though the complaint alleged that that officer had engaged in excessive force, the court stated that "Thorton's complaint fails to allege a failure to intervene. Thus, even if Thorton's allegations on his briefs are true, he did not in his complaint state a claim sufficient on which to base relief." *Ibid.*

And in this case, the Second Circuit approved the District Court's denial of an instruction on failure to intervene, finding that "plaintiffs' proposed jury instruction would have introduced a new claim to the case." App., *infra*, at 3a. The court came to that conclusion even though Petitioners had alleged, and it

was undisputed, that each defendant was in the small apartment during the assault.

The Seventh and Eleventh Circuits have taken a different approach. In *Miller* v. *Smith*, the Seventh Circuit court addressed a fact pattern much like the one here. The plaintiff alleged that he was attacked by a group of officers late at night, when he was "groggy" and "lying face-down." 220 F.3d 491, 493 (7th Cir. 2000). The District Court had found that the plaintiff "could not bring excessive force claims against any of the officers because he could not specify which one of them attacked him." *Id.* at 494–95. The Seventh Circuit reversed, holding that "whichever officer was not directly responsible for the beating was idly standing by." *Id.* at 495. The court believed that allegations that one of the officers who did not participate in the beating was merely present were sufficient to take the case to trial on a failure-to-intervene theory. *Ibid.* ("If Miller can show at trial that an officer attacked him while another officer ignored a realistic opportunity to intervene, he can recover.")[3] Most importantly, the court focused not on the name of the cause of action, but on the facts: "Since [plaintiff] alleges facts to support these claims, they should not have been dismissed." *Ibid.*

Further, the Eleventh Circuit in *Campbell* v. *Lynch* affirmed the district court's ruling that "[a] reasonable jury could find [one defendant] failed to take reasonable steps to protect [plaintiff]." 264 F.

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[3] The Eleventh Circuit, too, has found that "evidence that [a defendant] was present during the encounter" supports an inference of opportunity to intervene and is thus sufficient to defeat summary judgment. *Byrd* v. *Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986).

App'x 836, 837 (11th Cir. 2008) (unpub.). The court permitted the plaintiff to pursue that theory even though the complaint did not assert a claim called "failure to intervene" or allege that one defendant stood by while others used excessive force. See Cmplt., *Campbell* v. *Lynch*, N.D. Ga. No. 06-cv-00114, App., *infra*, 38a–41a. In fact, the complaint did not even use the phrase "excessive force." *Ibid.* Nonetheless, the court found that failure-to-intervene liability was part of the case.

As it stands, a plaintiff alleging liability for excessive force could be subject to a different pleading standard depending on the Circuit in which he brings his case. This result is especially unfair in light of the fact that many such plaintiffs will file their pleadings *pro se*. Viewed from the perspective of defendants, a more generous reading of pleadings will create little or no prejudice. A police officers' duty to intervene to stop the use of excessive force is well-established. Thus, an officer accused of participating in the use of force, who concedes being part of the group of officers at the scene, should be on notice that those facts could establish a failure to intervene. This Court should grant review to clarify the pleading standard and impose uniformity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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